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# Ducking Recusal: Justice Scalia's Refusal to Recuse Himself from *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), and the Need for a Unique Recusal Standard for Supreme Court Justices

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# Ducking Recusal: Justice Scalia's Refusal to Recuse Himself from *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), and the Need for a Unique Recusal Standard for Supreme Court Justices

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## I. INTRODUCTION

Perched in a duck blind on the bayou in southeastern Louisiana, waiting in anticipation for the next opportunity to raise his shotgun and take aim at incoming fowl, Justice Scalia could not have possibly anticipated that in a few short months, this hunting trip would be the target of an American media firestorm of scrutiny. Unless you are an avid watcher of the *Outdoor Living Network*, a Supreme Court Justice's duck hunting trip is hardly riveting news worthy of the attention of virtually every American media outlet. Unless, of course, Vice President Cheney is the Justice's special guest on this trip, and just a few weeks prior, the Supreme Court granted a writ of certiorari to hear a case in which the Vice President is a named party.

When the media caught wind of the facts surrounding this trip, there was an immediate and nationwide call for the Justice to recuse himself from the case, culminating in a motion for recusal filed by the Sierra Club.<sup>1</sup> Relying on the federal statutory recusal standard, which requires any federal judge to recuse himself if his partiality can reasonably be called into question, the Sierra Club cited several news sources from across the country unanimously calling for the Justice's recusal.<sup>2</sup>

Justice Scalia's response to the Sierra Club's motion for recusal was unprecedented. Issuing a twenty-one page memorandum, Justice Scalia dissected the Sierra Club's motion, pointing mainly to the blatant factual and legal errors contained in the motion as support for his conclusion that someone could not reasonably question his ability to decide the case involving the Vice President impartially.<sup>3</sup> Justice Scalia bolstered his position further by citing a substantial number of historical relationships between Supreme Court Justices and members of the Executive and Legislative branches, arguing that his relationship with the Vice President was no different than similar friendships in the past. Thus, there were no unusual circumstances necessitating recusal.<sup>4</sup>

Justice Scalia's response, though a compelling and thorough dismissal of the arguments raised by the Sierra Club's motion for recusal,

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1. Sierra Club Motion to Recuse at 2, *Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913 (2004) (No. 03-475), available at <http://news.findlaw.com/hdocs/docs/scotus/chny22304scrbrf.pdf> (last visited Nov. 11, 2005).

2. *Id.*

3. *Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 924 (2004) [hereinafter *Scalia Memorandum*] (Scalia, J.), available at <http://news.findlaw.com/hdocs/docs/scotus/chny31804jsmem.pdf> (last visited Nov. 11, 2005) (memorandum respecting recusal).

4. *Id.* at 916-18.

fails to apply the proper statutory recusal standard with which federal judges and Justices are expected to gauge the appropriateness of recusal. Furthermore, Justice Scalia's partial reliance on the duty-to-sit principle, abandoned by Congress when it amended the federal recusal standard in the early 1970s, is a further indication that something is amiss with his application of federal recusal policy.<sup>5</sup>

Part II of this Note discusses a more detailed factual background surrounding the Louisiana hunting trip at the center of the Justice Scalia recusal controversy and the Supreme Court's grant of certiorari a few weeks earlier. Included in this discussion is a thorough analysis of the federal statutory recusal standard that Justices must apply when deciding recusal questions. Part III analyzes Justice Scalia's memorandum in response to the motion for recusal, revealing both the continued presence of the duty-to-sit principle in Supreme Court recusal decision-makings, and the explicit misapplication of the federal recusal standard by Justice Scalia. Part IV illustrates the potential consequences of permitting the Supreme Court to continue to disregard the clear legislative intent behind the federal judicial recusal policy, and suggests two alternatives designed to address the policy concerns voiced by the Court as justification for this continued disregard of the federal statute.

## II. BACKGROUND OF THE RECUSAL ISSUE FACING JUSTICE SCALIA

### A. The Trip

On January 5, 2004, United States Supreme Court Justice Antonin Scalia accompanied Vice President Richard Cheney on a government-owned jet to Louisiana to enjoy a few days of duck hunting on the bayou.<sup>6</sup> Although Justice Scalia had been on this same trip for the past five years, it was the previous year that he learned that his Louisiana friend and host was an admirer of Vice President Richard Cheney.<sup>7</sup> Because Justice Scalia was "well acquainted"<sup>8</sup> with the Vice President "from their years serving together in the Ford administration,"<sup>9</sup> and because Justice Scalia was specifically aware that the Vice President was an avid duck-hunter, he extended an invitation to the Vice President in the spring of 2003 to accompany him the subsequent winter.<sup>10</sup> Vice President Cheney accepted the invitation and even offered space on his government plane for the trip, pending availability.

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5. See *infra* text accompanying notes 78–83.

6. Scalia Memorandum, *supra* note 3, at 915.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

There was free space, and so Justice Scalia, accompanied by two other guests, joined the Vice President on his plane for the journey to Louisiana.<sup>11</sup>

Justice Scalia described the setting of the hunting trip as simply not intimate.<sup>12</sup> This description was based on the fact that there were a total of thirteen hunters on this trip and several other staff members present,<sup>13</sup> all of whom ate together and slept in “rooms of two or three, except for the Vice President, who had his own quarters.”<sup>14</sup> Justice Scalia and Vice President Cheney never hunted together and were generally never alone except “for instances so brief and unintentional, . . . walking to and from a boat, perhaps, or going to or from dinner.”<sup>15</sup> The Vice President hunted for two days and then departed while Justice Scalia stayed and hunted a few more days before returning to Washington on a commercial airline from New Orleans.<sup>16</sup>

## B. The Writ

On December 15, 2003, roughly three weeks prior to the duck-hunting trip described above, the Supreme Court of the United States granted the Vice President's petition for a writ of certiorari.<sup>17</sup> In 2001, Judicial Watch, Inc. and the Sierra Club filed separate actions against the National Energy Policy Development Group (“NEPDG”)<sup>18</sup> and individual group members including the board's chair, Vice President Cheney, alleging that the NEPDG failed to comply with the Federal Advisory Committee Act (“FACA”).<sup>19</sup> Specifically, Judicial Watch, Inc. and the Sierra Club alleged that the Vice President ap-

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11. *Id.* at 920–21. Justice Scalia also states that his family members were not given a ride solely because of their relation to him. Rather, any person going on this trip who happened to be departing from the Washington, D.C. area would have been extended the same courtesy from the Vice President. *Id.* at 921 n.2.

12. *Id.* at 915.

13. The hunting trip's host, Mr. Carline, had three staff members present and the Vice President was accompanied by an undisclosed number of staff and security detail. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* *Cheney v. United States Dist. Court for the Dist. of Columbia*, 540 U.S. 1088 (2003).

18. The NEPDG is a task force created by President George W. Bush charged with “developing a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future.” *In re Cheney*, 334 F.3d 1096, 1099 (D.C. Cir. 2003) (quoting Memorandum Establishing National Energy Policy Development Group (Jan. 29, 2001)). The task force was to consist of six cabinet secretaries, several other agency heads and assistants to the President, and any other officers of the federal government invited to participate by the Vice President. *Id.*

19. *Id.*

pointed non-federal employees to the group, thereby requiring that group to make public all reports, records, or other documents used pursuant to FACA.<sup>20</sup> After consolidating the separate actions, the district court denied the defendants' motion to dismiss and subsequently approved the plaintiffs' discovery plan.<sup>21</sup> Although the government generally complied with the discovery plan, a motion for a protective order was filed for documents relating specifically to the Vice President.<sup>22</sup> The court first denied the government's motion for protective order and then denied a request by the defendants for the court to certify an interlocutory appeal on this issue.<sup>23</sup> The government subsequently filed an emergency motion for writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit seeking an order vacating the lower court's discovery orders and that the Vice President be dismissed as a defendant from the action.<sup>24</sup> The court of appeals dismissed the defendants' interlocutory motion, but in December, 2003, the Supreme Court granted a writ of certiorari on this discovery issue, and the case was set for argument.<sup>25</sup>

### C. The Problem

After learning from the media that Vice President Cheney, a named party in an action before the Supreme Court, went with Justice Scalia on a hunting trip shortly after the Court granted certiorari on the action, the Sierra Club<sup>26</sup> filed a motion for recusal with the Supreme Court, asking that Justice Scalia not participate in any proceedings concerning whether the Vice President should be compelled to disclose specific documents.<sup>27</sup> The Sierra Club premised its motion on the recusal standard for federal judges found at 28 U.S.C. § 455(a), arguing that the vast majority of America's newspapers, representing the voice of America and reflecting the public's purported perception of impartiality, have called for Justice Scalia's recusal from this case and that "any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned."<sup>28</sup> The Sierra Club

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20. *Id.* at 1099–1100.

21. *Id.* at 1100.

22. *Id.* The government argued the discovery plan violated separation of powers principles. *Id.*

23. *Id.* at 1101.

24. *Id.*

25. *See* United States v. Bobo, 323 F. Supp. 2d 1238, 1240 (N.D. Ala. 2004) (tracing the legal path of case against the NEPDG to the Supreme Court).

26. Judicial Watch, Inc. did not join with the Sierra Club in making the recusal motion, publicly expressing their doubts that "the presently known facts about the hunting trip satisfy the legal standards requiring recusal." Scalia Memorandum, *supra* note 3, at 914.

27. *Bobo*, 323 F. Supp. 2d at 1240.

28. Scalia Memorandum, *supra* note 3, at 923 (quoting Sierra Club Motion to Recuse, *supra* note 1, at 3–4).

further argued that “[t]hese facts more than satisfy section 455(a), which mandates recusal merely when a Justice’s impartiality might reasonably be questioned.”<sup>29</sup>

#### D. The Federal Statute

Section 455 of title 28 of the United States Code is a collection of standards for federal judges, magistrates, and Supreme Court Justices to use in gauging the appropriateness of their recusal from an action before their respective courts. Section 455(a) specifically provides that a Justice “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>30</sup>

Congress adopted § 455(a) in its current form in 1974 with the expressed purpose of creating a uniform statutory and ethical standard for recusal so that “federal judges would no longer be subject to dual standards governing their qualifications to sit in a particular proceeding.”<sup>31</sup> In 1973, the Judicial Conference of the United States adopted the American Bar Association’s new Code of Judicial Conduct, making it applicable to all federal judges.<sup>32</sup> Canon 3(c)(1) of this newly adopted code provides that “a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.”<sup>33</sup> In the amended (and current) version of § 455(a), Congress adopted language virtually identical to that found in the judicial code. The benefit of such a revision was to replace the old subjective standard where a judge should recuse himself if “in his opinion” his impartiality was at issue, with a new objective standard of reasonableness.<sup>34</sup> The new standard was intended to “promote public confidence in the im-

29. *Id.* The Sierra Club specifically cited and attached as exhibits twenty of the thirty largest newspapers in the country that called on Justice Scalia to recuse himself. *Id.* They also noted that “not a single newspaper has argued against recusal.” *Id.*

30. 28 U.S.C. § 455(a) (2000).

31. H.R. REP. NO. 93-1453, at 9 (1974), as reprinted in 1974 U.S.C.C.A.N. 6351, 6353 (Department of Justice Report on proposed amendments to 28 U.S.C. § 455).

32. H.R. REP. NO. 93-1453, at 1–2, as reprinted in 1974 U.S.C.C.A.N. 6351, 6352.

33. H.R. REP. NO. 93-1453, at 4, as reprinted in 1974 U.S.C.C.A.N. 6351, 6353. In 1990, the Model Code of Judicial Conduct was somewhat reorganized and the recusal standard was moved from 3(c)(1) to 3(e)(1). However, “[t]he 1990 Code Committee retained the general standard for disqualification that appeared in Section 3(c)(1) of the 1972 Code.” AMERICAN BAR ASSOCIATION CENTER FOR PROF’L RESPONSIBILITY, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 184–85 (1st ed. 2004).

34. H.R. REP. NO. 93-1453, at 5, as reprinted in 1974 U.S.C.C.A.N. 6351, 6354–55. The statute in its pre-1974 form read:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein.

partiality of the judicial process by saying . . . if there is a reasonable factual basis for doubting a judge's impartiality, he should disqualify himself."<sup>35</sup>

Another important reason why Congress adopted the objective version of § 455(a) was that it wanted to remove the duty-to-sit principle from judicial consideration.<sup>36</sup> Under the duty-to-sit principle, a federal judge, when faced with a close question of whether recusal would be appropriate, "was urged to resolve the matter in favor of a 'duty-to-sit.'"<sup>37</sup> In an opinion written about two years prior to the congressional amendment to § 455(a), then Associate Justice Rehnquist clearly stated the duty-to-sit principle as it applies to the Supreme Court:

[T]he policy in favor of the "equal duty" [duty-to-sit] concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction.<sup>38</sup>

By requiring that a judge "shall" disqualify himself whenever his "impartiality might reasonably be questioned," the amended § 455(a) "effectively removed the duty-to-sit concept" from the federal courts.<sup>39</sup> Congress specifically noted that "witnesses at the hearings were unanimously of the opinion that elimination of this 'duty-to-sit' would enhance public confidence in the impartiality of the judicial system."<sup>40</sup> Post-1974 case law indicates that federal courts are now resolving the recusal question in close cases in favor of recusal.<sup>41</sup>

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Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858 n.7 (1988) (emphasis added) (quoting 28 U.S.C. § 455 (1970)).

35. H.R. REP. NO. 93-1453, at 5, as reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

36. *Id.*

37. *Id.* (citing *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964)).

38. *Laird v. Tatum*, 409 U.S. 824, 837 (1972).

39. Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 673 (1985) (citing H.R. REP. NO. 93-1453, at 5, as reprinted in 1974 U.S.C.C.A.N. 6351, 6355); see also 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §3549 (2d ed. 1984) (noting that the 1974 amendment to § 455 "has ended the duty-to-sit concept in federal courts").

40. H.R. REP. NO. 93-1453, at 5, as reprinted in 1974 U.S.C.C.A.N. 6351, 6355. "[P]ublic confidence in the judiciary was undermined by a doctrine that could be read as suggesting that in close cases judges should err in favor of participation. Rather, the judicial tiebreaker should tend in the other direction, compelling recusal in the close cases to avoid any taint of bias . . ." Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589, 606 (2003).

41. See, e.g., *Republic of Panama v. Am. Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000) ("[I]f the question of whether § 455(a) requires disqualification is a close one[,] the balance tips in favor of recusal."); *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993) ("Where the question is close, the judge must recuse himself."); *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989) (stating that



The Supreme Court has recognized that the objective of the post-1974 version of § 455(a) is

to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.<sup>42</sup>

In a recent discussion regarding the proper administration of § 455(a), Chief Justice Rehnquist noted that "[t]his inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."<sup>43</sup>

When applying the federal recusal standard, it is important to note that the judge whose impartiality is in question is the one who makes the final determination regarding the appropriateness of recusal.<sup>44</sup> Upon appeal, a federal judge's recusal decision is subject to review under an abuse of discretion standard.<sup>45</sup> However, a Supreme Court Justice's recusal decision is not subject to review and the Justice is in no way required to announce the reasons for his decision.<sup>46</sup>

### E. Justice Scalia's Response to the Motion to Recuse

Not only did Justice Scalia deny the Sierra Club's motion for recusal, he also took the extraordinary step of issuing a twenty-one page memorandum explaining his reasoning for reaching such a con-

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§ 455(a) "requires judges to resolve any doubts they may have in favor of disqualification").

42. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

43. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). In *Microsoft Corp.*, the Supreme Court denied both Microsoft's direct appeal and their request for writ of certiorari for the case. Included in this opinion is a statement by Chief Justice Rehnquist explaining why he did not recuse himself from the vote on this case even though his son is not only a partner at a law firm representing Microsoft but is also an attorney specifically working on a separate Microsoft issue. *Id.* Chief Justice Rehnquist determined that "a well-informed individual would [not] conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court." *Id.*

44. This is most clearly indicated in the statute itself where it provides that a justice "shall disqualify himself." 28 U.S.C. § 455(a) (2000).

45. *See Bannister v. Delo*, 100 F.3d 610, 614 (8th Cir. 1996).

46. Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 659 (1996); *see also* Sherrilyn A. Ifill, *Do Appearances Matter? Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 620 (2002) ("[T]he disqualification decisions of Supreme Court Justices are not subject to review by other judges or courts."). This is not to say, however, that a Justice does not consult the opinion of other Justices on occasion. In *Microsoft Corp.*, Chief Justice Rehnquist first noted that he had "consulted with his colleagues," prior to reaching his final decision on the recusal question. *Microsoft Corp.*, 530 U.S. at 1301.

clusion.<sup>47</sup> As a preliminary matter, Justice Scalia established a legal standard upon which he would rely for guidance in reaching his final decision not to recuse himself. Citing Chief Justice Rehnquist's recusal opinion from *Microsoft Corp. v. United States*,<sup>48</sup> Justice Scalia pronounced that a judge's impartiality should "reasonably be questioned"<sup>49</sup> only when inquiries are "made in light of the facts as they existed, and not as they were surmised or reported."<sup>50</sup> To a large degree, Justice Scalia relied on the public misperception of both the facts surrounding the hunting trip and the law relating to judicial recusal in this matter, as reported in America's media, in making his decision to deny the motion for recusal.

Justice Scalia called the Sierra Club argument that the major newspapers are the voice of the American public "staggering," in light of the factual inaccuracies reported in the articles relied on by the Sierra Club.<sup>51</sup> For example, he singled out articles from the *San Francisco Chronicle*, *Boston Globe*, and *San Antonio Express-News* because each described a different duration for the hunting trip.<sup>52</sup> In another example, he cited several other articles which proclaimed, in alternative forms, that he and the Vice President spent a substantial amount of time alone together.<sup>53</sup> For each of the noted factual inaccuracies found in the newspaper articles, Justice Scalia carefully contrasted the facts of the hunting trip as they actually happened in order to leave no doubt regarding the gross misstatements pervading the media on this topic.<sup>54</sup>

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47. Scalia Memorandum, *supra* note 3, at 929. Justice Scalia's memorandum is described as "extraordinary" because it represents only one of a handful of instances where a Justice has issued a formal writing documenting his recusal rationale. Chief Justice Rehnquist authored two other recusal opinions in *Laird* and *Microsoft Corp.* See *supra* notes 38, 43 and accompanying text. Justice Scalia's memorandum is also unique because, at twenty-one pages, it is roughly twenty pages longer than the other two recusal explanations.

48. 530 U.S. 1301 (2000).

49. Although Justice Scalia does not specifically cite 28 U.S.C. § 455(a) as the statutory premise for the reasonableness standard quoted here, he later cites that statute when quoting the identical language. See Scalia Memorandum, *supra* note 3, at 916.

50. *Id.* at 914.

51. *Id.* at 923. For a complete list of the factual inaccuracies noted by Justice Scalia, see *id.* at 923-24.

52. *Id.* at 923-24. According to these various articles, the duration of the hunting trip was four days, nine days, and several days. *Id.*

53. *Id.* The descriptions of the time spent together are quite colorful and serious. The articles declared the two "spent time alone in the rushes," and accused them of being "huddled together in a Louisiana Marsh" where they had "plenty of time . . . to talk privately." *Id.* (internal citations omitted). The most serious of such descriptions came from the *Buffalo News* that concluded "there is simply no reason to think these two did not discuss the pending case." *Id.*

54. See *id.*

In addition to the factual exaggerations and misstatements of the articles and editorials, Justice Scalia showed great concern regarding the failure of the news media to correctly describe and apply the legal issues implicated by his friendship with the Vice President. Although he readily acknowledged their friendship,<sup>55</sup> Justice Scalia refused to accept the media implication that this friendship, in and of itself, is sufficient to reasonably call into question his impartiality on the case involving the Vice President.<sup>56</sup> Recognizing that "friendship is a ground for recusal . . . where the personal fortune or the personal freedom of the friends is at issue,"<sup>57</sup> Justice Scalia proclaimed that a friendship has "traditionally not been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer."<sup>58</sup>

Justice Scalia called a rule which would require Justices to recuse themselves from official actions in which friends are involved as "utterly disabling."<sup>59</sup> He grounded his rejection of what he called a "no-friends rule"<sup>60</sup> in a long history of well-known friendships between Justices and other federal officials who, at some point, had business before the Supreme Court in their official capacity. Noting friendships between President John Quincy Adams and Chief Justice John Marshall, President Theodore Roosevelt and Justice Oliver Wendell Holmes, and the several Justices who were friends with President Harry S. Truman, Justice Scalia pointed out that an application of a "no-friends rule" would have surely required these Justices to recuse themselves from several important and historically profound cases in which their "official" friends were directly involved.<sup>61</sup>

Justice Scalia then turned to the case-at-hand and noted that in their complaint, the Sierra Club specifically designated the Vice President as a party "in his official capacity,"<sup>62</sup> both as the Vice President and as the Chairman of the NEPDG.<sup>63</sup> He also pointed out that Vice President Cheney is represented in this action by the United States Department of Justice and not by a personal attorney.<sup>64</sup> Finally, Justice Scalia recognized the potential political ramifications for the Vice President if the Court was to rule in favor of Judicial Watch, Inc. and

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55. In his memorandum, Justice Scalia cites his familiarity and acquaintance with the Vice President as a reason for initially extending the hunting trip invitation. *Id.* at 914. In another discussion Justice Scalia explicitly says that he and the Vice President are friends. *Id.* at 916.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 917.

61. *Id.*

62. *Id.* at 917-18.

63. *Id.* at 918.

64. *Id.*

the Sierra Club, and then rebutted this concern in two ways.<sup>65</sup> First, he equated the potential effect of this action on the Vice President's integrity and reputation with that of any other official in "virtually all official-action suits."<sup>66</sup> Justice Scalia then summarily rejected the notion that a Justice should make a recusal decision based on the degree of political damage the case may inflict, describing such a rule as "quite wrong."<sup>67</sup>

Justice Scalia also expressed concern about the inaccuracies reported in the nation's media regarding his flight to Louisiana with the Vice President on Air Force Two. Justice Scalia specifically addressed the contention that by accepting the free flight, Justice Scalia "accepted a sizeable gift from a party in a pending case."<sup>68</sup> As a practical matter, Justice Scalia found this argument without merit because of the fact that he purchased a round trip ticket from New Orleans to Washington, D.C. which was equivalent in cost to the ticket he would have purchased if the Vice President never offered the space on Air Force Two in the first place.<sup>69</sup> Thus the flight with the Vice President saved no money and was accepted solely because of its convenience. As a matter of legal concern, Justice Scalia pointed out that government officials frequently accompany members of the Executive Branch on government planes when space permits and that accepting this sort of flight "is not the sort of gift thought likely to affect a judge's impartiality."<sup>70</sup>

Reasserting that the question of recusal is to be determined from the perspective of a reasonable observer informed of all the facts and circumstances, Justice Scalia reiterated the factual and legal inaccuracies reported in the nation's newspapers and then rejected the motion for recusal, concluding that "[s]uch a blast of largely inaccurate and uninformed opinion cannot determine the recusal question."<sup>71</sup>

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65. *Id.* at 919-20.

66. *Id.* at 920.

67. *Id.*

68. *Id.*

69. *Id.* at 920-21.

70. *Id.* at 921. Justice Scalia bases this statement on the fact that the Ethics in Government Act of 1978, which generally requires Justices to disclosure travel arrangements provided by others, specifically excludes from this requirement transportation provided by the United States Government. *Id.* (citing 5 U.S.C. § 109(5)(C) (2000); COMM. ON FIN. DISCLOSURE, ADMIN. OFFICE OF THE U.S. COURTS, FINANCIAL DISCLOSURE REPORT: FILING INSTRUCTIONS FOR JUDICIAL OFFICERS AND EMPLOYEES, 25 (Jan. 2003)).

71. *Id.* at 924. There is one other consideration raised by Justice Scalia in his memorandum that is omitted from the discussion above. After noting that the Sierra Club was unable to find any relevant case law to bolster their recusal argument, Justice Scalia delivered a lengthy discussion of several cases that he believed to be quite similar to the case-at-hand. The first set of cases involved Justice White and Robert Kennedy (as Attorney General) who were on a Colorado skiing trip while at least two cases involving Robert Kennedy were pending before the Su-

III. ANALYSIS OF JUSTICE SCALIA'S MEMORANDUM IN  
RESPONSE TO THE MOTION FOR RECUSAL IN *CHENEY v.*  
*UNITED STATES DISTRICT COURT FOR THE*  
*DISTRICT OF COLUMBIA*

Given a cursory reading, Justice Scalia's memorandum rejecting the Sierra Club's motion for recusal has the appearance of a sound decision premised on simple application of recusal law to the facts surrounding both his hunting trip and the Court's decision to hear the Vice President's case. However, closer scrutiny of the memorandum reveals Justice Scalia's clear application of the duty-to-sit concept in reaching his decision, even though Congress expressed the intention of eliminating that concept when it revised § 455(a). A simple comparison of Justice Scalia's recusal rationale to other Court recusal (or non-recusal) decisions demonstrates that it is the Court's policy to continue to apply the duty-to-sit principle in lieu of the revised objective recusal standard. Furthermore, the virtual absence of language referencing § 455(a) in his memorandum raises serious doubt whether Justice Scalia even considered the statutory recusal standard in reaching his final decision. Because "the Judiciary could not function as a viable institution in a democracy if the public lost faith in the impartiality and integrity of its judges,"<sup>72</sup> the issues implicated by Justice Scalia's recusal decision should serve as a glaring signal to Congress that it must revisit the subject of judicial recusal and provide an alternative recusal standard for Supreme Court Justices.

A. The Prevalence of the Duty-to-Sit Concept in Supreme  
Court Recusal Decisions

The legislative history of § 455(a) leaves no doubt that Congress, by converting the standard for recusal from a subjective to an objective standard, explicitly intended to eliminate the duty-to-sit concept from the federal judiciary with the expressed goal of enhancing the public's confidence in the federal court system.<sup>73</sup> Case law from various federal appellate jurisdictions demonstrates that judges are now resolving close recusal questions in favor of recusal rather than in favor of a duty-to-sit that was prevalent prior to the 1974 amendments

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preme Court. Two weeks after the trip, Robert Kennedy argued a third case in front of the Court. *Id.* at 924–25. The second example involved the friendship between Justice Jackson and President Franklin Roosevelt. Noting that the Justice took recusal obligations "particularly seriously," Justice Jackson continued to maintain a close personal friendship with the President "whose administration's acts came before him regularly." *Id.* at 925–26. Justice Scalia found no problem with these relationships and concluded that no one else at the time did either. *Id.* at 926.

72. Bloom, *supra* note 39, at 663–64 (citations omitted).

73. See *supra* notes 34–41 and accompanying text.

to the statute.<sup>74</sup> Notwithstanding the fact that § 455(a) is applicable to all federal judges, including Supreme Court Justices, Justice Scalia's memorandum unmistakably cites a duty-to-sit as one factor compelling him to deny the motion for recusal.<sup>75</sup> Furthermore, it is equally clear that Justice Scalia's citation to this duty is not isolated as the Court itself has specifically mandated that a Supreme Court Justice must resolve a close recusal question in favor of hearing the case.<sup>76</sup>

Rather than explicitly referencing the duty-to-sit concept, Justice Scalia cited the unique dynamic of having nine irreplaceable Justices at the Supreme Court level as the compelling factor for resolving close recusal inquiries. Justice Scalia further noted that at the federal trial and appellate court levels, a judge who recuses herself from a case is replaced by another judge and the case proceeds normally.<sup>77</sup> At the Supreme Court level, on the other hand, there is no replacement Justice, and so the Court would be forced to proceed with eight Justices, thereby "raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case."<sup>78</sup> To bolster the legitimacy of this concern, Justice Scalia cited the official recusal statement issued by the Supreme Court in 1993 where the Court cautioned that "[e]ven one unnecessary recusal impairs the function of the Court."<sup>79</sup>

Although no other Supreme Court Justice has cited directly to this official recusal statement, in 2000 Chief Justice Rehnquist voiced concerns similar to those voiced by Justice Scalia. Responding to questions about his refusal to recuse himself from the underlying case because his son was a lawyer at a law firm representing Microsoft, Chief Justice Rehnquist cautioned that in the Supreme Court "there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court."<sup>80</sup>

The similarity between the reasoning of Justice Scalia and that of Chief Justice Rehnquist is unmistakable as they voice virtually identical concerns about the repercussions of recusal of a Supreme Court Justice. These statements are also remarkably similar to those made in *Laird v. Tatum*,<sup>81</sup> a 1972 opinion written by then Associate Justice

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74. See *supra* note 41 and accompanying text.

75. See *infra* text accompanying notes 78–83.

76. See *infra* notes 80–81 and accompanying text.

77. See Scalia Memorandum, *supra* note 3, at 915.

78. *Id.*

79. *Id.* at 916 (quoting U.S. SUPREME COURT, STATEMENT OF RECUSAL POLICY (1993)).

80. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000). For further background information on this case, see *supra* note 43 and accompanying text.

81. See *supra* note 38 and accompanying text.

Rehnquist in which he emphatically embraced the duty-to-sit concept. Issued two years prior to Congress' elimination of the duty-to-sit concept from recusal consideration, Justice Rehnquist's statement called the policy favoring a duty-to-sit at the Supreme Court level "even stronger" because of the irremediable effects implicated by just one Justice's recusal.<sup>82</sup> The resemblance of the 1972 statement to the contemporary statements issued by Justice Scalia and Chief Justice Rehnquist is not coincidental and it is quite clear that the duty-to-sit rationale cited in 1972 remains equally as strong for the Court today.

The pragmatic concerns voiced by the Justices in these statements and by the 1993 official recusal statement of the Supreme Court all point to a fundamental flaw in the statutory recusal process as it applies to the High Court. Two commonly cited costs associated with the recusal of one Justice are that the Court will be robbed of that Justice's legal input and decision-making power on what is likely a pivotal and national legal issue, and that the Court must proceed with eight Justices which, as noted by the Chief Justice in *Microsoft Corp.*, poses the risk that the Court will be locked in a four-to-four tie requiring them to affirm the decision below.<sup>83</sup> Because there is no court beyond the Supreme Court where a litigant can be heard, it is certainly understandable that a Justice would resolve a close recusal question in favor of sitting. It should not be surprising, then, that in spite of the explicit Congressional intent to rid the federal judiciary of the duty-to-sit concept, the Court of last resort has retained that "duty" in order to shield litigants from a failure to adequately resolve their issue.

#### **B. Justice Scalia Failed to Apply the § 455(a) Recusal Standard in Reaching His Final Decision**

Justice Scalia indicated the legal question regarding his recusal was "whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane."<sup>84</sup> Although Justice Scalia's injection of the word "reasonably" gives this statement a semblance of consistency with the § 455(a) objective standard, it is clearly out of alignment with a proper application of that statute. Pursuant to § 455(a), the recusal issue does not turn on whether a Justice "can" decide a case impartially; rather this statutory standard requires a Justice to recuse himself if his impartiality could "reasonably be questioned."<sup>85</sup> Recall as well the

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82. See *supra* note 38 and accompanying text.

83. See *supra* note 80 and accompanying text.

84. Scalia Memorandum, *supra* note 3, at 928–29.

85. See *supra* note 30 and accompanying text.

Supreme Court's own interpretation of § 455(a), which recognizes that a judge should recuse himself to avoid "even the appearance of partiality."<sup>86</sup>

The difference between the Supreme Court's interpretation of § 455(a) as requiring "the appearance of impartiality" on one hand, and the standard used by Justice Scalia on the other, is illustrative of a distinction drawn in the legal community regarding the appropriate standard necessary to warrant a Justice's recusal:

The two principal competing standards of proof are the appearance-of-bias test—the allegations need only be sufficient to support a reasonable apprehension of bias—and the bias-in-fact test—the allegations must be sufficient to support a conclusion that bias actually exists. The obvious distinction between the two tests lies in the differing evidentiary burdens, with the bias-in-fact test requiring the more substantial showing.<sup>87</sup>

The objective standard written into § 455(a) by Congress in 1974 "suggests that the appearance of bias [test] is the appropriate standard of proof" to be applied to the statutory recusal question.<sup>88</sup> The applicability of this standard is substantiated by the statute's legislative history where it is clearly states that a judge should "disqualify himself" if there exists "a reasonable factual basis for doubting the judge's impartiality."<sup>89</sup> In other words, the proponent of recusal is not required to prove a Justice's actual bias in a case; rather she must only prove that the facts demonstrate an appearance of that Justice's impartiality.<sup>90</sup>

The bias-in-fact test is relevant to gauging the necessity of recusal under § 455(b)(1) which requires a judge's recusal if she "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."<sup>91</sup> Under this

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86. See *supra* note 42 and accompanying text.

87. Randall J. Litteneker, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 242-43 (1978). Note that § 455 is not the only statutory recusal provision. Another statute provides that a judge "shall proceed no further" in an action where a party has filed an affidavit "that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . ." 28 U.S.C. § 144 (2000). It is equally as important that "§ 144 applies only to district courts, [whereas] § 455 is applicable to any justice, judge, or magistrate of the United States." WRIGHT & MILLER, *supra* note 39, § 3542. Because a party is required to allege that a judge actually has a bias in the underlying action, § 144 is widely held to be "most compatible with the bias-in-fact standard." See Litteneker, *supra*, at 243.

88. See Litteneker, *supra* note 87, at 247.

89. H.R. REP. NO. 93-1453, (1974), as reprinted in 1974 U.S.C.C.A.N. 6351.

90. The "appearance of impartiality" standard used by the Supreme Court is synonymous with appearance-of-bias test noted above, and thus it is a reasonable conclusion that the Court has adopted this appearance standard. See *supra* note 42 and accompanying text.

91. 28 U.S.C. § 455(b)(1) (2000) (emphasis added). One commentator points out that "[t]he language of subsection (b)(1) is identical to the language of § 144 which . . . has long been held to be governed by a bias-in-fact standard." Litteneker, *supra*



subsection, a judge's recusal is not mandated by a question of reasonableness regarding impartiality as in subsection (a); rather, a judge is required to recuse herself because she actually has a manifest bias in the case-at-hand.<sup>92</sup>

The recusal standard used by Justice Scalia does not fit neatly under either of these tests. The bias-in-fact test is clearly not at issue in this matter because neither the Sierra Club nor Justice Scalia make mention of it. Rather, in their motion for recusal, the Sierra Club unmistakably anchors its push for Justice Scalia's recusal in the appearance-of-bias test. The Sierra Club specifically asserted that "it is the *appearance* of partiality—and not actual bias—that is the test for recusal under Section 455(a)".<sup>93</sup> Interestingly, Justice Scalia makes only three passing references to the § 455(a) standard en route to reaching his non-recusal decision in response to the Sierra Club's motion. On two of these three occasions Justice Scalia makes no effort to apply the standard; instead, he simply notes the general implication made by the Sierra Club that his friendship or "appearance of friendship" with the Vice President gives rise to the appearance of impropriety.<sup>94</sup> The third mention of the appearance standard occurs in the context of a direct quote from the Sierra Club's recusal motion wherein they argue that there is an "appearance of favoritism" implicated by hunting trip.<sup>95</sup> At no point does Justice Scalia make any effort to apply the appearance standard to the specific facts surrounding the Court's grant of certiorari and the Louisiana hunting trip three weeks later in an effort to gauge whether these facts may give rise to an appearance of bias.

Rather than making his recusal decision under either of the available recusal standards, Justice Scalia chose instead to focus on the factual and legal inaccuracies found throughout the Sierra Club's motion. Challenging the veracity of the facts and law reported in the news articles, Justice Scalia was able to shift attention to the absurdity of the Sierra Club's contention that the mass media should serve as a litmus test for what a reasonable person might think. Because the recusal question must be decided from the "perspective of a *reasonable*

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note 87, at 246–47. For a general comparison of § 455 and § 144, see WRIGHT & MILLER, *supra* note 39, §§ 3542, 3551.

92. See WRIGHT & MILLER, *supra* note 39, §3543.

93. Sierra Club Motion to Recuse, *supra* note 1, at 3. The Sierra Club references § 455(a) on several occasions throughout their brief, leaving no doubt regarding their belief that Vice President Cheney's "vacation" with Justice Scalia amounts to an appearance of bias. See *id.* at 1–3, 7–8.

94. Scalia Memorandum, *supra* note 3, at 928. The language quoted in the text above is actually the second reference by Justice Scalia to the appearance standard. His first reference is made in the identical context as that cited above but worded slightly differently: "appearance of *my* friendship." *Id.* at 920 (emphasis added).

95. *Id.* at 923 (citation omitted).

observer who is *informed of all the surrounding facts and circumstances*,”<sup>96</sup> and because America’s newspapers were so blatantly wrong in their reporting, Justice Scalia’s rejection of the Sierra Club’s motion was both simple and convincing. However, Justice Scalia left unresolved the ultimate recusal issue: whether a reasonable person would perceive an appearance of partiality in the actual facts and law (and not those reported in the newspapers).<sup>97</sup>

#### IV. CONGRESS SHOULD ADOPT A DISTINCT RECUSAL POLICY FOR SUPREME COURT JUSTICES IN ORDER TO ENSURE THE PUBLIC’S CONTINUED CONFIDENCE IN THE IMPARTIALITY AND INTEGRITY OF THE HIGHEST COURT

As one scholar has stated: “The people’s trust in the fairness of their judges is the foundation of our system of Justice. To earn this trust, judges must inspire confidence in their impartiality. Judicial authority and public order both ultimately flow from public respect for, and confidence in, the impartiality of our judges.”<sup>98</sup> The recusal problems highlighted in this Note are in no way intended to suggest that the power of the federal judiciary, specifically that of the Supreme Court, is teetering upon collapse because of a loss of public confidence in a Justice’s impartiality. Although there may be some occasional disagreement regarding the latest Supreme Court opinion, the public typically values the Court’s authority as the definitive and final word on a given legal issue. With this fact in mind, many might argue that the recusal procedure for the Supreme Court does not need to be adjusted because of questionable application of § 455(a) at the Supreme Court level. However, it is these very inconsistencies, when accentuated by a highly polarizing recusal inquiry such as that surrounding Justice Scalia in the Vice President’s matter, which can begin to chip away at the public’s faith in Supreme Court hegemony.<sup>99</sup>

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96. *Id.* at 924 (citations omitted).

97. Because the purpose of this Note is not to speculate on what Justice Scalia’s recusal decision should have been, there will be no further inquiry or discussion on that topic here. For the purposes of this Note, it should suffice to conclude that Justice Scalia’s memorandum has framed a rather nebulous Supreme Court recusal issue, thus implicating a need for clarification of the recusal standard for the Supreme Court.

98. Pamela Willis Baschab, *Putting the Cash Cow out to Pasture: A Call to Arms for Campaign Finance Reform in the Alabama Judiciary*, 30 CUMB. L. REV. 11, 12 (2000).

99. Virtually every newspaper in this country included some sort of commentary on the appropriateness of Justice Scalia’s recusal from this case. Sierra Club Motion to Recuse, *supra* note 1, at 3–6. Although many of these articles carried some factual and legal inaccuracies, they do point to a general public concern over the recusal question in this case. Presumably, Justice Scalia’s recusal decision was in the spotlight of virtually all talk radio and television news programs as well. If nothing else, the public media’s concern with this recusal question indicates that

Congress specifically cited its intention to enhance public confidence in the federal judiciary when it adopted the objective revisions to § 455.<sup>100</sup> The Supreme Court's mis-application of the current standard to its recusal decisions exposes the Court to the development of a loss of that public confidence. Thus, it would be prudent for Congress to revisit the recusal issue in order to develop an alternative recusal standard that provides for the unique concerns facing Justices on the Supreme Court. One possibility would be to submit Justice recusal decisions to a final vote of all nine of the Court members. Another alternative would be to develop a recusal system similar to that of the lower federal courts where a recused Justice is replaced by another "Justice," thereby allowing the litigation to proceed with minimal interruption. Each of these options has benefits and drawbacks meriting a more in-depth discussion below. These solutions are not intended to be conclusive. They are merely suggested starting points for developing a Supreme Court recusal policy that achieves and maintains the express legislative goals of maintaining public confidence in the judiciary.

#### A. Permit All Nine Justices to Vote on the Recusal Question

Currently, a Justice's recusal decision is completely autonomous and definitive. Even if there is some question regarding the appropriateness of the Justice's decision, there is no statutory provision to be invoked that would allow such an inquisition.<sup>101</sup> This inability to challenge a recusal decision has led one commentator, while discussing § 455(a), to suggest that "[m]otions containing allegations of an appearance of partiality should be decided by another judge. Because this provision 'asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge,' the challenged judge is perhaps the last person who should rule on the motion."<sup>102</sup> Clearly there is some merit to the notion that a judge's ability to gauge impartiality based on an objective standard is tempered by her personal involvement with whatever issue prompted the recusal question in the first place. Without the safeguard of appeal for the litigant at the Supreme Court level (unlike litigants in the lower federal courts), a Justice's self-determination of a questionable recusal question may result in diminished confidence in the Court's ultimate decision be-

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the public, or at least those who either read the newspapers, listened to the radio shows, or watched the news, formed some sort of opinion about Justice Scalia's recusal.

100. See *supra* note 35 and accompanying text.

101. See *supra* note 46 and accompanying text.

102. Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 559 (1994) (quoting *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980)).

cause of lingering doubts surrounding that Justice's impartiality. However, if all nine Justices were involved in the recusal decision, that confidence would be bolstered by the assurance that the recusal decision was the result of discussion and deliberation by the entire Court.

Procedurally, it would not be difficult to implement a policy for the entire Court to review a Justice's recusal rationale. A Justice would be required to memorialize the recusal issue inclusive of the relevant facts, law, and personal impressions regarding the appropriateness of recusal. The Justice would then submit these findings to the remaining Justices who would then meet to discuss the recusal issue. Presuming the parties in the underlying action adequately briefed the recusal issue, their participation in this meeting should be excluded in order to facilitate an expedient resolution to the matter. The Court would then render a final vote on the appropriateness of recusal.<sup>103</sup> If a majority of the Court finds that a Justice's impartiality is reasonably called into question pursuant to § 455(a), then that Justice is to abide by that finding. Additionally, the Court's final vote should be recorded; however, the Court should retain discretion regarding the need to issue a formal opinion on the recusal decision.<sup>104</sup>

A simple application of this suggestion to the Justice Scalia and Vice President matter illustrates how powerful such a policy could be. Imagine, if instead of ruling on the Sierra Club's recusal motion and then issuing a twenty-one page memorandum explaining the decision (and subsequently unleashing the fury of American media), Justice Scalia submitted the memorandum to the entire Court, where there was discussion on the issue, and then a final vote favoring denial of the motion. Although there may continue to be some public dissatisfaction with this outcome, it would be difficult to call into question the

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103. The Justice whose impartiality is being questioned would participate in the oral discussions regarding recusal and the final vote on recusal. If the Justice were excluded from participation, the inquiry would be devalued greatly because there would be potential for a four-to-four tie vote, which is one of the risks prompting the suggestion for reform in the first place. Furthermore, if a Justice were excluded from participating in the question of his own recusal, then the public may call into question the legitimacy of the Court's findings because that Justice may not have been adequately represented in the deliberations.

104. The Court's discretion here is important for two reasons. First, the recusal question may or may not be an issue worthy of the time required for the Court to go through the formalized process of opinion drafting. Because the Court would be required to gauge every recusal motion, there will surely be some instances where the answer is relatively clear from the Justice's memorandum, which would require little, if any, discussion on the matter. Thus requiring an absolute standard here may be unduly burdensome. Also important is that federal judges and Justices are not currently required to record their recusal reasoning. This expectation places much faith in the integrity of judicial decision-making and should not be upset by an absolute standard requiring the Supreme Court to record its recusal reasoning.

legitimacy of such a result because involvement of the entire Court provided an additional safeguard against an erroneous ruling.

Beyond enhancing public confidence, the additional benefits of requiring full Court participation in recusal decisions are that the Court may be prompted both to abandon the duty-to-sit concept and to apply the appearance-of-bias test in reaching its final decision. Although this proposal may fail to fully alleviate the risk of reducing the Court to eight voting members, the knowledge that a full Court recusal decision may be scrutinized by legal minds and by the public (through the tinted lens of America's media, no doubt) may encourage the Court to embrace the objective changes made to § 455(a) in 1974.

One drawback implicated by this proposal is the effect on the Court's already busy schedule. Enacting a full Court recusal policy would require the Court to spend additional time on the recusal question when it is already under incredible time constraints.<sup>105</sup> It is not clear how often a Justice's impartiality is called into question pursuant to § 455(a) because a Justice is not required to publicly account for his decision, and thus it is difficult to accurately estimate what sort of impact a new policy would have on the Court. It should be sufficient to suggest that there would necessarily be some adverse impact.

A second issue of concern is the possibility that a final vote regarding recusal will be perceived as being more motivated by an alignment of political ideology rather than by proper application of § 455(a). It is not a shocking revelation that Justices are appointed to the Court with their own political views, which are often reflected in their judicial decisions.<sup>106</sup> Some of the decisions reached by the Court are politically oriented with conservative Justices voting one way and liberal Justices voting the other. For this reason, the Supreme Court "has aggressively worked to protect the image of its decision-making as above the fray of politics, personal interest, or internecine battles."<sup>107</sup> It is imperative to be mindful of the Court "politics" when framing any reform to the federal recusal standard. If, for example, the public perception is that conservative Justices consistently vote together on the

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105. The demands for the Supreme Court's time is evidenced by the fact that "[i]n a typical year, over 7,000 petitions are filed with the Supreme Court for review of lower court decisions. The Court denies review in the vast majority of cases, and, in recent years, has issued full opinions in fewer than 100 cases each term." E.B. Williams Library Research Guides, U.S. Supreme Court Research, [http://www.ll.georgetown.edu/lib/guides/supreme\\_court.html](http://www.ll.georgetown.edu/lib/guides/supreme_court.html) (last visited Nov. 11, 2005).

106. See DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 32-33 (6th ed. 2003) (quoting W. Rehnquist, Presidential Appointments to the Supreme Court, Lecture at the University of Minnesota (Oct. 9, 1984)) ("There is no reason in the world why a President should not 'pack' the Court—appoint people to the Court who are sympathetic to his political and philosophical principles.").

107. Ifill, *supra* note 46, at 614.

recusal question in favor of advancing a conservative agenda—or liberal Justices doing the same for a liberal agenda—then there would inevitably be some stifling effect on the public's confidence in the Court's decisions.

A final concern with a policy allowing the entire Court to determine the recusal question is that a Justice may not be entirely objective and forthcoming with all relevant information for the Court to make a sound decision. If a Justice's partiality is called into question, she is likely to have a strong opinion, one way or the other, on the subject. It would, therefore, be nearly impossible to erase hints of subjectivism in a Justice's recusal memorandum to the Court. For example, certain facts may be construed as being vitally relevant while others completely minimized or even excluded altogether. It is difficult to expect the Court to properly apply an objective recusal standard to information that has been spun in one direction or another. Thus, a policy requiring the entire Court to vote on the appropriateness of a Justice's recusal will require strong emphasis on eliminating this personal subjectivity in order to get to the foundational objective issues upon which the appropriate recusal decision must be made.

## B. The Alternative Justice

A second possible amendment to Supreme Court recusal policy available to Congress is to enact a temporary Justice provision, which would permit a qualified substitute to "fill in" for a Justice opting for recusal. Steven Lubet, Professor of Law at Northwestern University, supports this very proposition in a well-developed article, suggesting that either the Chief Judge of the District of Columbia Circuit or a retired Supreme Court Justice be used as a temporarily fill-in.<sup>108</sup>

Professor Lubet finds justification for the "substitute-Justice" plan in the policies of state and federal circuit courts, which utilize a temporary substitution scheme.<sup>109</sup> Lubet suggests the Chief Judge of the District of Columbia Circuit as a potential candidate; however, he cites no reason why this judge would be the only good candidate for a substitute Supreme Court Justice.<sup>110</sup> The physical proximity of that

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108. See Lubet, *supra* note 46, at 673–75. In his article, Lubet does not suggest this policy in the context of Justice recusal; rather, his discussion of the use of a substitute Justice is limited to certiorari decisions made by the Court.

109. *Id.* at 673–74. For a description of various state constitutional provisions enacting a temporary judge scheme, see *id.* n.78. For a description of the federal circuit court of appeals temporary replacement policy, see *id.* at 674 n.79.

110. *Id.* at 673. Lubet does warn, however, that "[t]he use of a non-Supreme Court judge would require legislative authorization and subsequent confirmation by the Senate of any judge who might be enlisted." *Id.* n.77 (citing U.S. CONST. art. III, § 1 (giving Congress the power to "ordain and establish" inferior courts); U.S. CONST. art. II, § 2, cl. 2 (giving power to appoint Supreme Court Justices to the Senate as well as the President)).

judge to the Supreme Court (both located in Washington, D.C.), and the presumed tenure and expertise of a Circuit Court Chief Judge are likely the most compelling reasons. Except for the physical proximity disadvantage of not being located in Washington, D.C., the Chief Judge of any of the federal appellate circuit courts would be equally as qualified for this role.

To avoid the constitutional hassles involved with using a non-Supreme Court Justice as a substitute,<sup>111</sup> Lubet suggests using a retired Supreme Court Justice as the fill-in.<sup>112</sup> Pursuant to 28 U.S.C. § 371, a retired Justice is permitted to “retain the office” (maintain a salary), if she continues with limited participation in Supreme Court activity.<sup>113</sup> Because there is already a statutory provision for participation of a retired Justice, Lubet notes that “there would appear to be no statutory impediment to a Court rule (or practice) that calls upon retired Justices to participate in certain votes.”<sup>114</sup>

Thus, in addition to formally enacting a substitute Justice policy, the only additional requirement is that there must be living retired Justices to play the alternate role. Lubet’s article was printed in 1996 when Justices Lewis Powell, William Brennan, Harry Blackmun, and Byron White were all living and officially retired from the Court. None of these Justices, however, are alive today. Until the recent retirement of Justice Sandra Day O’Connor, no Justice had stepped down since President Bill Clinton’s appointment of Justice Stephen Breyer in 1994 (replacing the retiring Justice Blackmun).<sup>115</sup>

Regardless of whether a circuit court chief judge or a retired Supreme Court Justice is used as a substitute, there are clearly some sticky issues requiring resolution for this plan to succeed. The major problem with using a circuit judge lies in the often difficult and technical task of sifting through the constitutional requirements of such a plan.<sup>116</sup> The obvious flaw in a plan to use retired Justices is spotlighted by the fact that there is currently only one retired Justice. Consequently, it may be imprudent to root recusal reformation in

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111. See *supra* note 110 and accompanying text.

112. Lubet, *supra* note 46, at 675.

113. *Id.* n.82 (quoting 28 U.S.C. § 371(b)(1) (2000)). In order to “retain the office,” a retired Justice must be certified annually by the Chief Justice of the Supreme Court. 28 U.S.C. § 371(e). The certification process requires the Chief Justice to look at a variety of contributions by the retired Justice to the Court, including the Justice’s “caseload involving courtroom participation,” and judicial duties not involving courtroom participation. *Id.* If, in the Chief Justice’s view, the retired Justice’s participation amounts to at least three months work, then the retired Justice is said to be certified. *Id.*

114. Lubet, *supra* note 46, at 675 n.82.

115. OYEZ, U.S. Supreme Court Justices, <http://www.oyez.org/oyez/portlet/justices/> (last visited Nov. 11, 2005) (providing a biography of every Justice to have served on the Supreme Court inclusive of year of retirement and year of death).

116. See *supra* note 110 and accompanying text.

something as unpredictable as the retirement and survival of its Justices. Even Lubet notes that if there were "no retired Justice [ ] available or willing to substitute . . . the Court would have to proceed . . . with eight members."<sup>117</sup>

One implication not discussed by Lubet is the possibility that a Justice considering recusal may weigh the political ideology of the alternative Justice in her ultimate recusal decision. Consider, for example, the present case involving Justice Scalia, a conservative Supreme Court Justice. If he weighed recusal with the knowledge that a liberal Justice would be his substitute, he may choose not to recuse himself in lieu of the prospect of permitting the Court's vote to be reflective of a more liberal framework. Given the outward attempt by the Court to remove politics from its policies and procedures, one would hope that a Justice would never permit her ultimate recusal decision to turn on the substitute Justice's political ideology.

The drawbacks of this substitute Justice plan are clearly overshadowed by the promise such a plan has for maintaining the public's confidence in the Court. The threat of the Court being reduced to eight voting members is sufficiently mitigated by this plan because the replacement Justice would permit the Court to retain the benefits of a nine-member vote, and thus avoid a four-to-four tie. This was one of the primary reasons cited by members of the Court for resolving close recusal questions in favor of sitting. A substitute Justice scheme would permit the Court to finally abandon the duty-to-sit concept explicitly abolished by Congress in 1974. An additional benefit of this plan is that it may prompt Justices to apply the appropriate appearance of impartiality standard to their recusal decisions pursuant to § 455(a). Because there would be less concern about the effects of reducing the Court to eight voting members, a Justice may devote more attention to making a decision based on the appropriate standard.

## V. CONCLUSION

Justice Scalia's staunch defense of his decision to go duck hunting with the Vice President only weeks after the United States Supreme Court voted to grant a writ of certiorari to hear the discovery issue in *Cheney v. United States District Court for the District of Columbia* is a well-developed response to the Sierra Club's motion for recusal. Primarily concerned with the factual and legal inaccuracies relied on in support of the motion, Justice Scalia delivered a one-two punch to the motion, ultimately finding recusal to be inappropriate in this instance.

Although a well-drafted response to the Sierra Club's motion, Justice Scalia's memorandum falls short of addressing whether recusal was appropriate in this case. Justice Scalia does place the recusal

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117. Lubet, *supra* note 46, at 675.



question within the scope of the § 455(a) objective standard as evidenced by the scattered and half-hearted references to a "reasonable person" throughout his memorandum. Justice Scalia's failure to apply the appearance of impropriety standard, declared by the Supreme Court to be the appropriate standard, is indicative of a general disregard for Congress' primary motivation for revising § 455(a) in 1974.

Further disregard for the intended function of the federal recusal standard is found in Justice Scalia's reference to the duty-to-sit concept, which has been referenced as well by other Justices and, more broadly, in the Court's official recusal policy. Congress' intent in abolishing the duty-to-sit concept by revising § 455(a) was explicit. Continued application of that policy by the Supreme Court not only demonstrates disregard for the nation's law making body, but it also sends the wrong message to the American public, upon whose confidence the Judicial Branch's legitimacy depends.

It is not difficult to imagine a world where Justices are the butt of jokes for comedians and late night talk show hosts, where the public is polarized and numbed by an unrelenting media blitz on the most recent Supreme Court holdings, and where a begrudging public questions and resists Supreme Court opinion on all fronts because of perceived bias in those who reached the decision. Most would agree that this is an accurate description of the current state of affairs in the Executive and Legislative Branches.

Unlike the other branches of the federal government, the judiciary is not directly accountable to voters. However, legal commentators, members of the judiciary, and legislators alike have continually recognized the importance of retaining, and even enhancing, the public's confidence in the purity of the judicial system because the authority of its decisions is derived from that confidence. The tremendous amount of public attention and criticism Justice Scalia has received for his recusal decision has been remarkably similar to the sort of public frenzy one would expect with the latest presidential policy or congressional squabbling. The danger in this sort of attention to the Court is self-evident.

If Justice Scalia's decision was consistent with the statutory recusal standard and representative of the intended function of that provision, then the public's concern over his decision might have been quelled by the accurate application of the law to the facts at issue. However, because Justice Scalia clearly failed to apply the law in this situation, the public's disdain for his refusal to recuse himself is well founded and should send a signal to this nation's lawmakers regarding a need to address the Supreme Court recusal issue.

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